

Respondent is a corporation that contracts with financial institutions to pick up and deliver documents. Terry M. Hatfield, respondent's president, testified he is respondent's sole employee. But there are 48 drivers under a contract with respondent to pick up and deliver documents for the financial institutions. Mr. Hatfield testified that respondent does not withhold any FICA or state withholding from any of the driver's paychecks. He further testified that the time schedule for pick up and delivery is established as part of the contract between respondent and each particular financial institution. One of the vendors also requires, for identification purposes, that drivers performing the service wear a patch that indicates they work for respondent. A scanner was used in order to keep track of the driver. Mr. Hatfield further noted that respondent sets the rate that the drivers receive for each particular route. He testified:

Q. On this negotiation with the drivers, can you name any of the drivers who negotiated their own price, that set their own price?

A. I don't think so.

Q. So basically it was a matter of your setting a price of what you were willing to pay to Mr. Ramirez and other drivers like Mr. Ramirez and they could either accept it or not.

A. Right.

Q. And then you told Mr. Ramirez if he accepted this rate what the requirements were for the job; is that correct?

A. That's correct.

Q. And you told him that, for example, that he would have to use scanners, he would have to have a badge, he would have to pass a background check, he would have to be at certain locations at specific times; is that correct?

A. Right.

Q. All of those things are correct, is that correct?

A. That's correct.

Q. Did Mr. Ramirez at any time ever get to select his own route?

A. No.¹

¹ P.H. Trans. at 124.

Claimant began working with respondent in October 2002. Claimant testified he had to complete an application, provide a copy of his driving record and show he was drug free. As a further part of the process to obtain a pick up and delivery route from respondent the claimant was provided additional documents to sign. Respondent provided claimant a document titled Workers Compensation Letter of Understanding which indicated claimant was a sole proprietor and elected not to carry workers compensation coverage. The document was signed by claimant and further noted claimant maintained an independent contractor status and as a result the respondent did not provide workers compensation coverage.² Claimant was required to fill out and sign additional documents which also identified the claimant as an independent contractor driver.³

On the first day claimant began driving a route for respondent he received a photo identification badge. Claimant testified he was paid \$135 a day for his routes and was paid every two weeks by Mr. Hatfield. He further testified his route could not change unless Mr. Hatfield changed it. The last day the claimant worked was April 30, 2004.

As previously noted, claimant's job involved delivering bank documents within a specific time schedule. On October 8, 2003, in Augusta, Kansas, the claimant was involved in an automobile accident after picking up documents at the Commercial Federal Bank. Claimant had stopped his vehicle behind a vehicle making a left turn when his vehicle was struck from behind. Claimant was taken by ambulance to Via Christi St. Francis Hospital in Wichita, Kansas. Claimant had requested that another individual contact Mr. Hatfield. Mr. Hatfield drove claimant's vehicle back to respondent's office in Wichita later that day.

After being dismissed from the hospital, claimant personally contacted Mr. Hatfield to advise him of the accident and that Mary Abraham would be doing his route. On October 9, 2003, claimant had an additional conversation with Mr. Hatfield about his back injury and the two substitute drivers available to cover his route. The substitute drivers covered the claimant's route for approximately four or five days before claimant returned to work. Both individuals that covered the claimant's route had to be approved and were provided identification badges. Claimant submitted his medical bills to his automobile insurance carrier. Claimant described himself as being self-employed.

Q. Do you understand when I use the term - - were you a sole proprietor?

A. I don't understand. I'm not a lawyer.

Q. Okay. You were self-employed, is that correct?

A. Yes, sir.

² *Id.*, Resp. Ex. 1.

³ *Id.*, Resp. Ex. 2, 3 & 4.

Q. In other words, when you received payment from Express Courier, there were no deductions for social security or income tax withholding or unemployment withholding; is that correct?

A. Yes, sir.

Q. And you received the gross contractual pay.

A. Right.

Q. Then you paid your own taxes?

A. Yes, sir.

Q. Did you maintain your own workers' compensation insurance coverage?

A. No sir.⁴

Claimant continued to receive some chiropractic treatment after his release from the emergency room but returned to driving his routes until April 30, 2004. Claimant had been told his route was being changed but because a box used to deliver doughnuts as part of the new route would not fit into claimant's vehicle the new route was given to someone else. Consequently, claimant no longer had a route to drive and his relationship with respondent was terminated.

The Workers Compensation Act is to be liberally construed to bring employers and employees within its provisions and protections.⁵

It is often difficult to determine in a given case whether a person is an employee or an independent contractor because there are, in many instances, elements pertaining to both relationships that may occur without being determinative of the actual relationship.⁶

There is no absolute rule for determining whether an individual is an independent contractor or an employee.⁷ The relationship of the parties depends upon all the facts, and the label that they choose to employ is only one of those facts. The terminology used

⁴ *Id.* at 57-58.

⁵ See K.S.A. 44-501(g).

⁶ *Jones v. City of Dodge City*, 194 Kan. 777, 402 P.2d 108 (1965).

⁷ *Wallis v. Secretary of Kans. Dept. of Human Resources*, 236 Kan. 97, 689 P.2d 787 (1984).

by the parties is not binding when determining whether an individual is an employee or an independent contractor.⁸

The test primarily used by the courts in determining whether the employer-employee relationship exists is whether the employer had the right of control and supervision over the work of the alleged employee and the right to direct the manner in which the work is to be performed, as well as the result that is to be accomplished. It is not the actual interference or exercise of control by the employer, but the existence of the right or authority to interfere or control that renders one a servant, rather than an independent contractor.⁹

In addition to the right to control and the right to discharge the worker, other commonly recognized tests of the independent contractor relationship are:

- (1) The existence of a contract to perform a piece of work at a fixed price.
- (2) The independent nature of the worker's business or distinct calling.
- (3) The employment of assistants and the right to supervise their activities.
- (4) The worker's obligation to furnish tools, supplies and materials.
- (5) The worker's right to control the progress of the work.
- (6) The length of time the employee is employed.
- (7) Whether the worker is paid by time or by job.
- (8) Whether the work is part of the regular business of the employer.¹⁰

In this particular instance, the Board finds respondent had the right to control the work performed by claimant and the other drivers. Additionally, if the relationship did not work, respondent had the right to refuse to continue employing claimant or any of the other drivers. The respondent contracted with the financial institutions and determined the times claimant and the other drivers were required to pick up the documents. In essence, respondent set claimant's work hours and the sequence the pick up and deliveries were to be performed. Claimant worked for no one but respondent. Claimant would start and end his day at the respondent's office. A scanner was used to keep track of when claimant picked up documents. Claimant was required to wear an identification patch indicating he worked for respondent. Claimant did not operate an independent business in which he

⁸ *Knoble v. National Carriers, Inc.*, 212 Kan. 331, 510 P.2d 1274 (1973).

⁹ *Wallis* at 102 & 103.

¹⁰ *McCubbin v. Walker*, 256 Kan. 276, 886 P.2d 790 (1994).

offered services to the general public. Finally, the work claimant performed was the regular business of the respondent.

The Board is aware that other aspects of the relationship between claimant and respondent, for example the written documents the parties executed, suggest that claimant was an independent contractor. The Board, however, is persuaded the preponderance of the evidence establishes that claimant was respondent's employee for purposes of the Workers Compensation Act. The significant control that respondent exercised over claimant indicates that claimant was not an independent contractor. Therefore, the ALJ's Order awarding claimant benefits should be affirmed.

As provided by the Act, preliminary hearing findings are not binding but subject to modification upon a full hearing of the claim.¹¹

WHEREFORE, it is the finding of the Board that the Order of Administrative Law Judge Nelsonna Potts Barnes dated June 21, 2005, is affirmed.

IT IS SO ORDERED.

Dated this 30th day of September 2005.

BOARD MEMBER

c: Roger A. Riedmiller, Attorney for Claimant
Joseph H. Cassell, Attorney for Respondent
Samantha N. Benjamin, Attorney for Respondent & Liberty Mutual Ins. Corp.
Nelsonna Potts Barnes, Administrative Law Judge
Paula S. Greathouse, Workers Compensation Director

¹¹ K.S.A. 44-534a(a)(2).